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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 526

THE UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES KRUSZEWSKI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered in the above-entitled case on October 13, 1947.

OPINION BELOW

The District Court did not write an opinion. The opinion of the Circuit Court of Appeals (R. 142–146) is reported at 163 F. 2d 884.

JURISDICTION

The judgment below was entered on October 13, 1947. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

A claim submitted by respondent was allowed by the General Accounting Office and a certificate of settlement was issued. Since the appropriation to which this claim was chargeable had lapsed, the President included it in a schedule of claims which he transmitted to Congress for its consideration. Congress appropriated funds for the payment of these claims, and respondent's claim was duly paid. Thereafter, more than one year after the certificate of settlement was issued on this claim, the Acting Comptroller General determined that the claim had been improperly allowed, reversed the certificate of settlement, and issued a second certificate showing respondent to be indebted to the United States by reason of the fact that his account had been debited with the amount paid him on the claim. This indebtedness was collected by set-off against an amount due respondent as reimbursement for transportation expense, and in a suit brought by respondent under the Tucker Act to recover the amount of the set-off, a judgment in his favor was rendered by the court below. The following questions are presented:

1. Whether the deficiency appropriation act was such an adjudication by Congress of respondent's claim as will bar a reopening and revision of the settlement of that claim by the Comptroller General.

2. Whether the limitation of one year, contained in Section 8 of the Dockery Act of 1894, on the time within which the Comptroller of the Treasury could revise the settlement of a public account is properly applicable to the Comptroller General, as it has been made applicable in the codification of that section and Section 304 of the Budget and Accounting Act of 1921, 31 U. S. C. 74, so as to bar a revision of the settlement of respondent's claim.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Act of March 26, 1934, c. 87, 48 Stat. 466, as amended, 5 U. S. C. 118c; the First Deficiency Appropriation Act, fiscal year 1938, c. 42, 52 Stat. 85, 95, 99; the Dockery Act of July 31, 1894, c. 174, sec. 8, 28 Stat. 162, 207; and the Budget and Accounting Act of June 10, 1921, c. 18, sec. 304, 42 Stat. 20, 24, 31 U. S. C. 74, are set forth in Appendix A, *infra,* pp. 25–30. The pertinent provisions of the regulations relating to this case, as contained in Executive Order 6657–A, are set forth in Appendix B, *infra,* pp. 31–32.

STATEMENT

As the result of the devaluation of the American dollar beginning early in July 1933, there was an appreciation of foreign currencies in relation to the American dollar by reason of which losses were sustained by officers and employees of the

United States stationed abroad. In order to meet this situation, Congress, by the Act of March 26, 1934, 48 Stat. 466, 5 U. S. C. 118c, authorized the annual appropriation of "* * * such sums as may be necessary to enable the President, in his discretion and under such regulations as he may prescribe * * *," to meet such losses. Pursuant to the authority vested in him by this Act, the President on March 27, 1934, by E. O. 6657–A, established regulations providing the method of computation and the method of payment of the losses resulting from appreciation of foreign currencies. As a part of the method of computation, the regulations included a table fixing a basic rate of exchange for the currency of each foreign country and the American dollar.

Respondent, while stationed in Berlin, Germany, as a representative of the Bureau of Customs, United States Treasury Department, received checks from the Government as salary and allowances totaling $1,700.71 during the periods July 1933 and February through May 1934 (R. 30.) These checks respondent sold to foreign bankers in exchange for credits in registered reichsmarks at rates ranging from 3.21 to 4.00 reichsmarks per dollar (R. 30). The basic rate fixed by E. O. 6657–A was 23.74¢ per reichsmark, or 4.2123 reichsmarks per dollar. In 1934 respondent made a claim for his exchange losses and was paid by the Treasury Department $359.85, this settlement being based upon the dif-

ference between the rate at which respondent actually converted his checks and the basic rate of exchange fixed by E. O. 6657–A (R. 30–31). In the audit of this claim, an item of $20.22 was disallowed and was refunded to the Government by respondent, so that the net payment on this claim was $339.63 (R. 31). In 1937 respondent submitted to the General Accounting Office a claim for $702.44 for losses alleged to have been sustained with respect to the same items of salary and allowances for which he had been paid $339.63 in 1934 (R. 31; Dft. Ex. 14, R. 129–131). This figure was arrived at by calculating the losses on the difference between the basic exchange rate fixed by E. O. 6657–A and the official rate of exchange for gold reichsmarks at the various accrual dates, and then deducting the amount paid in 1934. The official rate of exchange for gold reichsmarks had varied from 2.49 to 3.03 reichsmarks per dollar, as compared with 3.21 to 4.00 per dollar for registered reichsmarks, the difference in the rates being due to the fact that the registered reichsmarks were "blocked," i. e., their use was subject to certain restrictions, while the gold reichsmarks were "free," or unrestricted (R. 27, 30; Dft. Ex. 14, R. 130). This claim, reduced to $700.90, was allowed through error, and on December 3, 1937, the Acting Comptroller General certified that $700.90 was due respondent in addition to the $339.63 previously paid (R. 31; Plt. Ex. C, R. 7; Joint Ex. 1, R. 113).

The appropriation to which this amount was chargeable having expired, and the balance having been carried into the surplus fund under the provisions of Section 5 of the Act of June 20, 1874, 18 Stat. 110, as amended, 31 U. S. C. 713, this item was included in a schedule of claims transmitted to Congress by the President on January 26, 1938 (R. 31; Plt. Ex. D, R. 8–10). See H. Doc. No. 498, 75th Cong., 3d Sess. The First Deficiency Appropriation Act, fiscal year 1938, 52 Stat. 85, 95, 99, contained an appropriation for the payment of several claims of this nature, including respondent's claim, but without naming them, and respondent received payment by government voucher dated March 21, 1938 (R. 31).

Meanwhile, the original 1934 Act had been amended so that the item of $20.22 disallowed on respondent's first claim was made allowable, and on January 24, 1938, respondent submitted a claim for this amount (Dft. Ex. 15, R. 139–141). The General Accounting Office advised respondent that it considered this amount as having been included in the amount of the voucher dated March 21, 1938, and after some further negotiation respondent, on January 4, 1939, wrote a letter to the General Accounting Office requesting a review of the claim (Dft. Ex. 8, R. 123–124). In reply to this letter, the Acting Comptroller General, by letter of May 22, 1939, informed respondent that the General Accounting Office was crediting his account with the $20.22 claimed by him, but that

it was also debiting his account in the sum of $21.75 previously allowed, resulting in a net overpayment of $1.53. The Acting Comptroller General further advised that the payment of $700.90 made to respondent on March 21, 1938, was unauthorized and that the certificate of settlement covering it was therefore reversed, and demanded that respondent pay to the Government $702.43, the sum of these two items (Dft. Ex. 9, R. 125–128). Later respondent's account was re-credited with $21.75, and on January 22, 1941, the Comptroller General issued a certificate of settlement certifying that there was due to the United States from respondent the sum of $680.68.[1] (R. 32; Dft. Ex. 6, R. 119–121). Following a demand for payment and a refusal by respondent to pay, this amount was collected by set-off against an amount due respondent as reimbursement for expenses in connection with his transfer from Berlin, Germany, to Chicago, Illinois (Plt. Ex. B, R. 6–7).

On December 4, 1944, respondent instituted this proceeding under the Tucker Act in the District Court of the United States for the Northern District of Illinois to recover the amount thus set off. Respondent's action having been dismissed on the merits (R. 34–35), respondent took an appeal to the Circuit Court of Appeals for the Seventh

[1] Respondent requested a reconsideration on this ruling on several occasions, the decision of the Comptroller General on the second review being reported at 22 Comp. Gen. 952.

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Circuit, which reversed the lower court, holding that the Government did not have the power to revise respondent's claim because the appropriation by Congress of funds for its payment was a final adjudication, and for the further reason that a revision of the claim was barred by the one-year limitation contained in 31 U. S. C. 74 (R. 142–147). The court below did not reach a second issue raised by respondent on the appeal, that the Government did not have the right to set off the overpayment against an amount otherwise admittedly due to him (R. 142).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the appropriation by Congress of money for the payment of respondent's claim amounted to a final adjudication of that claim, making it immune from further revision or disallowance by the Comptroller General.

2. In holding that the authority of the Comptroller General to revise a claim is limited to one year by 31 U. S. C. 74, which is a codification of Section 8 of the Dockery Act of 1894 and Section 304 of the Budget and Accounting Act of 1921.

3. In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

The court below held both that an appropriation by Congress of money for the payment

of a claim, certified by the Comptroller General, which appropriation was made necessary because of the lapse of the original appropriation for such claims, is a final adjudication of that claim, and that the authority of the Comptroller General to revise a settlement of a claim is limited to one year by 31 U. S. C. 74. These holdings drastically affect the power of the Comptroller General to revise not only the audited claims which are submitted to Congress [approximately one thousand claims in excess of $500 each annually], but also his power to reopen and to revise all accounts under the jurisdiction of the General Accounting Office after the expiration of one year. We submit that the first of these holdings resulted from a complete misapprehension of the applicable decisions of this Court, and that the second is based on an erroneous codification of the applicable statutes, thus presenting an important question of federal law which has not been settled by this Court. The importance of the questions presented by these holdings in the administration of the fiscal affairs of the Government, calls, we submit, for an authoritative ruling by this Court.

1. The court below, in holding that the appropriation by Congress amounted to a final adjudication of respondent's claim, making it immune from further revision or disallowance by the Comptroller General or any agency of the Executive Department, relied upon the decisions of this

Court in *United States* v. *Price,* 116 U. S. 43, and *United States* v. *Louisville,* 169 U. S. 249 (R. 145).[2] The *Price* case is clearly distinguishable from the present case, however, since it involved a private act of Congress which specifically "authorized and required" the Secretary of the Treasury to pay a stated sum to an individual named in the act.[3] The first Deficiency Appropriation Act, fiscal year 1938, c. 42, 52 Stat. 85, the appropriation here involved, provided (52 Stat. at 95, 99):

AUDITED CLAIMS

> SEC. 4. (a) For the payment of the following claims, certified to be due by the General Accounting Office * * * and which have been certified to Congress * * * as fully set forth in House Document Numbered 498, Seventy-fifth Congress, there is appropriated as follows:
>
> * * * * *
>
> *Treasury Department:*
>
> * * * * *

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[2] The court below did not dispute the general proposition that the United States may recover funds improperly paid by its officers to persons not entitled thereto. *United States* v. *Wurts,* 303 U. S. 414, 415; *Sutton* v. *United States,* 256 U. S. 575; *Wisconsin Central Railroad* v. *United States,* 164 U. S. 190, 210.

[3] *United States* v. *Jordan,* 113 U. S. 418, cited in the *Price* case, is similarly distinguishable, since it involved a private act which "authorized and directed" the payment of a sum of money to a named individual.

> "For payment to officers and employees of the United States in foreign countries due to appreciation of foreign currencies (Treasury), $723.59.

This was a lump sum appropriation for the payment of all claims in this category, it appearing from House Document No. 498 that respondent's claim and two others of the same nature totaled $723.59. In making this appropriation, Congress did not use any such term as "required" or "directed" so as to make the payment of these claims mandatory, hence there is no reason to apply the rule laid down in the *Price* and *Jordan* cases, that the appropriation by Congress left no discretion in any official to determine whether the amount required to be paid was proper. *United States* v. *Louisville,* 169 U. S. 249, involved a barred claim by the City of Louisville, Kentucky, for the refund of taxes erroneously paid. Congress passed a special act for the relief of the city. The Secretary of the Treasury, to whom the claim was referred, reported his conclusion to Congress, there being available no appropriation. Congress included this award in a deficiency appropriation and the amount thus appropriated was duly paid to the city. Later Congress passed another act directing an audit of a further claim by the City of Louisville and provided an appropriation for the payment thereof. As an incident to the auditing of this second claim, the first claim, which had already been

allowed and paid, was reexamined, reduced, and the amount of the reduction deducted from the second claim. This Court held that the act appropriating money for the payment of the first claim was in the nature of a judgment, final in its character, leaving to the executive officers of the Government only the clerical function of making payment as directed by the act.

Although the *Louisville* case involved a factual situation somewhat different from that presented in either of the two earlier cases, it cannot be taken as laying down a broader rule, since it was assimilated to the *Jordan* and *Price* cases by this Court in *Buchanan* v. *Patterson,* 190 U. S. 353. In that case, the Court of Appeals of Maryland, in an equitable proceeding brought to distribute funds appropriated by Congress pursuant to judgments in the Court of Claims for payment to "Esther S. Buchanan, administratrix of the estate of William B. Buchanan, who was the surviving partner of the firm of S. Smith & Buchanan, deceased, * * *" and to "Esther S. Buchanan, administratrix, representing Smith & Buchanan," had held that the next of kin of William B. Buchanan were not entitled to share in the funds. In reviewing that decision on writ of error, this Court rejected the contention that Congress, by the appropriation act, had ratified and adopted the findings of the Court of Claims and had recognized and designated William B.

Buchanan as one entitled to relief under earlier legislation, and held that the language of the appropriation act, when taken in connection with other facts as to the original firm of Smith & Buchanan, showed that the appropriation was to Esther S. Buchanan as the representative of a class, and that it was not the intention of Congress to determine by the appropriation act who the persons in the class were. The court went on to say (190 U. S. 366–367):

> The cases of *United States* v. *Jordan*, 113 U. S. 418; *United States* v. *Price*, 116 U. S. 43, and *United States* v. *Louisville*, 169 U. S. 249, are not in conflict with this result. In those cases the appropriation was to the party named in the act and a specific sum was directed to be paid to such party. * * *

Thus, the rule embodied in these decisions seems clearly to be that where Congress appropriates a specific amount of money and directs or requires that it be paid to a particular person, such a statute is a final adjudication of that person's claim. This is the interpretation placed on those decisions by the Comptroller General. 5 Comp. Gen. 181; cf. 23 Comp. Dec. 259. We submit that this is the correct interpretation of those cases, and that the court below erred in drawing from them a broader rule which makes a mere appropriation of funds to be available for payment a final adjudication of a claim.

In determining the effect of the appropriation act in the *Buchanan* case, this Court considered the entire legislative scheme forming the background of the controversy and made the intention of Congress as disclosed thereby the determining factor. An examination of the legislative and administrative processes which result in an appropriation act such as we are concerned with here discloses the unreasonableness of the holding of the court below. Under Section 5 of the Act of June 20, 1874, 18 Stat. 110, as amended, 31 U. S. C. 713, appropriation balances unexpended after two full fiscal years are covered into the surplus fund of the Treasury. Claims for amounts chargeable against such funds may be filed at any time up to ten years (31 U. S. C. 71a, 237). However, the amounts previously covered into the Treasury's surplus fund may not be utilized to pay such claims as may be allowed until the funds are reappropriated by Congress, and it had been the practice to refer such claims settlements to the Treasury as certified by the Comptroller General, where they are retained until a proposed deficiency appropriation bill is prepared. The total sums allowed are included in the bill, listed separately by appropriations, but otherwise identified only by reference to the House or Senate documents wherein the actual claims are listed by name and amount but without detail as to the subject matter or justification

upon the merits. Congress does not ask to be advised of the basis or subject matter of the claims and does not reexamine them, but instead accepts the mere list of settlements as the sole information upon which to reappropriate the funds.[4] This same procedure was followed in the instant case. See H. Doc. No. 498, 75th Cong., 3d Sess., and the First Deficiency Appropriation Act, fiscal year 1938, c. 42, 52 Stat. 85, 95, 99.

Since there is nothing in the legislative process which even purports to be a reexamination of such claims or a consideration of them on their merits, there is no reason to assume that Congress intends the reappropriation of funds for their payment to be a final adjudication. These are not private bills employing terms which make payment of the sums appropriated mandatory, as in the *Jordan* and *Price* cases, nor are they instances where Congress has by a special act referred a claim to an executive officer for auditing and allowance and then has adopted his finding, as in the *Louisville* case. Instead, these deficiency appropriations are merely the handling of the routine business of the Government in a routine

[4] For a fuller discussion of the procedure for handling certified claims chargeable to appropriations which have lapsed, see the Hearings before the House Appropriations Subcommittee on the First Deficiency Appropriation Bill for 1945, 79th Cong., 1st Sess., pp. 583–586.

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way.[5] Although Congress has modified the procedure in recent years, beginning with the First Deficiency Appropriation Act, 1945, c. 95, 59 Stat. 77, 90, by authorizing the Treasury Department to pay certified claims not exceeding $500 each, all claims in excess of $500, of which, the Comptroller General advises, there are approximately one thousand a year, must still be submitted to Congress for the reappropriation of funds. The decision of the court below makes this reappropriation of funds a final adjudication of the claims in excess of $500, and thus gives to such claims an immunity from revision by the Comptroller General not enjoyed by the smaller certified claims paid pursuant to the authority referred to above or by the vast amount of claims which are paid while the original appropriations are still available. We submit that this inequitable result is not within the meaning of the pertinent statutes nor the intention of Congress, and was reached through a misapplication of the decisions of this Court.

2. The court below also held that the Comptroller General's authority to revise the settlement of a claim is limited to one year by 31

[5] The appropriation bill here involved was referred to the Committee on Appropriations in both the House and the Senate. 83 Cong. Rec. 1409, 1529. Bills for the payment or adjudication of private claims are referred instead to other committees. Rules of the House of Representatives, Rule XXI, clause 3.

U. S. C. 74 (R. 146). While concededly 31 U. S. C. 74, in its present form, does contain this limitation on the power of the Comptroller General, and, if valid, barred the revision here involved, we submit that in its present form 31 U. S. C. 74 is an erroneous codification of the basic statutes.

a. The citations in the credit to the text of 31 U. S. C. 74 are Section 8 of the Dockery Act of July 31, 1894, c. 174, 28 Stat. 207, and Section 304 of the Budget and Accounting Act of June 10, 1921, c. 18, 42 Stat. 24. The material portion of Section 8 of the Dockery Act provides:

> The balances which may from time to time be certified by the Auditors to the Division of Bookkeeping and Warrants, or to the Postmaster-General, upon the settlement of public accounts, shall be final and conclusive upon the Executive Branch of the Government, *except that any person whose accounts may have been settled, the head of the Executive Department, or of the board, commission, or establishment not under the jurisdiction of an Executive Department, to which the account pertains, or the Comptroller of the Treasury, may, within a year, obtain a revision of the said account by the Comptroller of the Treasury, whose decision upon such revision shall be final and conclusive upon the Executive Branch of the Government:* * * *
> [Italics supplied.]

Section 304 of the Budget and Accounting Act provides in material part:

> All powers and duties now conferred or imposed by law upon the Comptroller of the Treasury or the six auditors of the Treasury Department, * * * shall, so far as not inconsistent with this Act, be vested in and imposed upon the General Accounting Office and be exercised without direction from any other officer. The balances certified by the Comptroller General shall be final and conclusive upon the executive branch of the Government. * * *

The original codification of the above provisions as 31 U. S. C. 74, in the 1926 edition of the Code, did not contain any of that portion of Section 8 of the Dockery Act set out above in italics, which is the portion setting up the one-year limitation on the power to revise settlements. This one-year limitation was not included in 31 U. S. C. 74 until that section was restated in 1931, the new version first appearing in Supplement V to the 1926 edition of the United States Code. In this recodification, "the Comptroller General of the United States" was substituted for "the Comptroller of the Treasury" in the clause italicized above, so that the one-year limitation thus inserted in Section 74 was made binding on the Comptroller General just as it had been on the Comptroller of the Treasury.

It should be noted, however, that the language italicized in the above quotation from Section 8 of the Dockery Act constitutes an exception to the first clause of that section, which provides

that "The balances which may from time to time be certified by the Auditors * * * upon the settlements of public accounts, shall be final and conclusive upon the Executive Branch of the Government * * *," and that when this provision, made applicable to the Comptroller General, was carried forward into Section 304 of the Budget and Accounting Act, the exception containing the one-year limitation on the power to revise settlements was omitted. The omission of this exception is significant as indicating a Congressional purpose to repeal the one-year limitation. *Johnson* v. *United States,* 225 U. S. 405, 415; *Shamrock Oil Corp.* v. *Sheets,* 313 U. S. 100, 107; *United States* v. *One Ice Box,* 37 F. 2d 120, 123 (N. D. Ill.). Certainly there is no presumption that the omission was inadvertent. *De Haven Mfg. Co.* v. *United States,* 31 F. 2d 999, 1003 (E. D. N. Y.). On the contrary, there is a presumption that everything intended was expressed; *Eyster* v. *Centennial Board of Finance,* 94 U. S. 500, 503; as well as a presumption of manifest intention to change the law, where Congress in a particular act uses different language from that used in prior legislation on the same subject. *Taft* v. *Commissioner of Internal Revenue,* 92 F. 2d 667, 669 (C. C. A. 6), affirmed, 304 U. S. 351; *United States* v. *Stroop,* 109 F. 2d 891, 893–894 (C. C. A. 6); 1 Sutherland, *Statutory Construction* (1943), sec. 1930.

A study of the legislative history of the Budget and Accounting Act of 1921 does not reveal any direct expression of the intention of Congress with regard to this particular question. The chief change effected by that Act was that it transferred powers lodged in the officers of the Treasury Department to the Comptroller General and made his office independent of the executive branch of the Government. See *Globe Indemnity Co.* v. *United States,* 291 U. S. 476, 480. As for the recodification of 31 U. S. C. 74, the Code only establishes *prima facie* the laws of the United States and cannot prevail over the Statutes at Large when the two are inconsistent. 1 U. S. C. 54 (a); *Stephan* v. *United States,* 319 U. S. 423, 426. There is, we submit, an inconsistency between 31 U. S. C. 74 and Section 304 of the Budget and Accounting Act.

b. Moreover, even if there has not been an implied repeal of the one-year limitation on the time within which certain officers of the Government may obtain a revision of a claim, it is petitioner's contention that in the codification of the basic statutes the Comptroller General has been erroneously included as one of those subject to this limitation, and that therefore the court below erred in holding him to be bound by it. Under Section 304 of the Budget and Accounting Act, the Comptroller General had vested in him all the powers and duties not only of the Comptroller

of the Treasury but also of the six auditors of the Treasury Department. The significance of this lies in the fact that, while the Comptroller of the Treasury was clearly bound by the one-year limitation contained in Section 8 of the Dockery Act, that limitation was held inapplicable to the six auditors of the Treasury Department. 4 Comp. Dec. 303, 312; 11 Comp. Dec. 459; cf. *Blazek* v. *United States,* 44 C. Cls. 188. In other words, the one-year provision of the Dockery Act was a limitation upon appeal from the auditors to the Comptroller of the Treasury; it was not a limitation upon the power of the auditors to revise their own original settlements. Congress must have been aware of an administrative interpretation of such long standing and could reasonably be expected, if dissatisfied with it, to negative that interpretation by a specific provision in the Budget and Accounting Act. The failure to do so is persuasive evidence of Congress' acquiescence in that interpretation. See *National Lead Co.* v. *United States,* 252 U. S. 140, 146; *Brewster* v. *Gage,* 280 U. S. 327, 337; *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, 492; *Mass. Mutual Life Ins. Co.* v. *United States,* 288 U. S. 269, 273; *Morgan* v. *Commissioner of Internal Revenue,* 309 U. S. 78, 81; *United States* v. *American Trucking Ass'ns,* 310 U. S. 534, 549–550. Thus, "* * * the function which [the Comptroller General] exercises

in auditing and settling claims against the government is precisely that which was previously exercised by the Accounting Office in the Treasury Department." *Globe Indemnity Co.* v. *United States*, 291 U. S. 476, at 480.

As the successor to the auditors the Comptroller General is, therefore, not limited in his authority to reopen accounts, because the auditors themselves were never so limited. The Comptroller has in fact exercised this authority on many occasions, in cases where the corrections were favorable not only to the Government but to the claimants. The court below erred, therefore, in holding that the Comptroller General's revision of respondent's account was without authority because it was made more than one year after settlement.[6] Such a limitation on the authority of the Comptroller General would preclude the reopening of accounts not only for mistake but also for fraud, a result which, had it been within the intention of Congress, would certainly have been

[6] Respondent's contention (not passed upon below) that the Government had no right to set off the overpayment on this claim against an amount otherwise due him, is without merit. As this Court said in *United States* v. *Munsey Trust Co.*, 332 U. S. 234, at 239: "* * * the government has the same right 'which belongs to every creditor, to apply the unappropriate moneys of his debtor, in his hands, in extinguishment of the debts due to him.' *Gratiot* v. *United States*, 15 Pet. 336, 370; *McKnight* v. *United States*, 98 U. S. 179, 186. * * *."

expressed in more positive terms than those employed in Section 304 of the Budget and Accounting Act.

3. The questions are important. We are advised by the Comptroller General that either branch of the case affects a very considerable volume of the claims settled by the General Accounting Office, that, if the holding below be allowed to stand, substantial changes in the claims settlement procedure of the General Accounting Office will be required, and that a greater expense to the Government in effecting those settlements will result. He also points out that not only the right of the Government but also the opportunity of persons having claims or accounts with it to have their claims and accounts reopened and revised for the correction of errors adverse to their claim necessarily will be circumscribed [7] to an extent which cannot now be fully foretold.

---

[7] He cites as examples the recent decisions of this Court in *United States* v. *Townsley*, 323 U. S. 557, and *United States* v. *Myers*, 320 U. S. 561, clarified 321 U. S. 750. These decisions altered somewhat the rules as formerly understood in respect of the proper method of figuring salaries of sizable groups of government officers and employees. Under the decision below, it would be impossible to reopen and resettle many of these accounts and claims where settlement had been made and balances thereon stated. Revision of such accounts is required if equality of treatment to many employees affected is to be obtained and it is conceivable that equality would be denied if the rule of decision in the present case were to prevail.

773170—48——4

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JANUARY 1948.

APPENDIX A

STATUTES INVOLVED

1. The Act of March 26, 1934, c. 87, 48 Stat. 466, as amended, 5 U. S. C. 118c, provides in material part:

> There are authorized to be appropriated annually such sums as may be necessary to enable the President, in his discretion and under such regulations as he may prescribe and notwithstanding the provisions of any other Act and upon recommendation of the Director of the Budget, to meet losses sustained on and after July 1, 1933, by officers, enlisted men, and employees of the United States while in service in foreign countries due to the appreciation of foreign currencies in their relation to the American dollar * * *: *Provided,* That such action as the President may take shall be binding upon all executive officers of the Government: * * *

2. The First Deficiency Appropriation Act, fiscal year 1938, c. 42, 52 Stat. 85, 95, 99, provides in material part:

> AUDITED CLAIMS
>
> SEC. 4. (a) For the payment of the following claims, certified to be due by the General Accounting Office * * * and which have been certified to Congress * * * as fully set forth in House Document Numbered 498, Seventy-fifth Congress, there is appropriated as follows:
>
> * * * * *

Treasury Department:

* * * * *

For payment to officers and employees of the United States in foreign countries due to appreciation of foreign currencies (Treasury), $723.59.

3. Section 8 of the Dockery Act of July 31, 1894, c. 174, 28 Stat. 162, 207–208 provides in material part:

> SEC. 8. The balances which may from time to time be certified by the Auditors to the Division of Bookkeeping and Warrants, or to the Postmaster-General, upon the settlements of public accounts, shall be final and conclusive upon the Executive Branch of the Government, except that any person whose accounts may have been settled, the head of the Executive Department, or of the board, commission, or establishment not under the jurisdiction of an Executive Department, to which the account pertains, or the Comptroller of the Treasury, may, within a year, obtain a revision of the said account by the Comptroller of the Treasury, whose decision upon such revision shall be final and conclusive upon the Executive Branch of the Government: *Provided,* That the Secretary of the Treasury may, when in his judgment the interests of the Government require it, suspend payment and direct the re-examination of any account.
>
> * * * * *
>
> Any person accepting payment under a settlement by an Auditor shall be thereby precluded from obtaining a revision of such settlement as to any items upon which payment is accepted; but nothing in this Act

shall prevent an Auditor from suspending items in an account in order to obtain further evidence or explanations necessary to their settlement. When suspended items are finally settled a revision may be had as in the case of the original settlement. Action upon any account or business shall not be delayed awaiting applications for revision: *Provided,* That the Secretary of the Treasury shall make regulations fixing the time which shall expire before a warrant is issued in payment of an account certified as provided in sections seven and eight of this Act.

The Auditors shall, under the direction of the Comptroller of the Treasury, preserve, with their vouchers and certificates, all accounts which have been finally adjusted.

* * * * *

Disbursing officers, or the head of any Executive Department, or other establishment not under any of the Executive Departments, may apply for and the Comptroller of the Treasury shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the Auditor and the Comptroller of the Treasury in passing upon the account containing said disbursement.

Sections one hundred and ninety-one and two hundred and seventy of the Revised Statutes are repealed.

4. Section 304 of the Budget and Accounting Act of June 10, 1921, c. 18, 42 Stat. 20, 24, provides in material part:

SEC. 304. All powers and duties now conferred or imposed by law upon the

Comptroller of the Treasury or the six auditors of the Treasury Department, and the duties of the Division of Bookkeeping and Warrants of the Office of the Secretary of the Treasury relating to keeping the personal ledger accounts of disbursing and collecting officers, shall, so far as not inconsistent with this Act, be vested in and imposed upon the General Accounting Office and be exercised without direction from any other officer. The balances certified by the Comptroller General shall be final and conclusive upon the executive branch of the Government. The revision by the Comptroller General of settlements made by the six auditors shall be discontinued, except as to settlements made before July 1, 1921.

* * * * *

5. Section 8 of the Dockery Act and Section 304 of the Budget and Accounting Act were originally codified in the 1926 edition of the United States Code, 31 U. S. C. 74, as follows:

Nothing in this chapter shall prevent the General Accounting Office from suspending items in an account in order to obtain further evidence or explanations necessary to their settlement. The Secretary of the Treasury shall make regulations fixing the time which shall expire before a warrant is issued in payment of an account certified as provided in this section and section 72 of this title.

The General Accounting Office shall preserve, with their vouchers and certificates, all accounts which have been finally adjusted.

Disbursing officers, or the head of any executive department, or other establish-

ment not under any of the executive departments, may apply for and the General Accounting Office shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern said office in passing upon the account containing said disbursement.

6. The recodification of Section 8 of the Dockery Act and Section 304 of the Budget and Accounting Act, which first appeared in Supplement V to the 1926 United States Code, issued in 1931, is 31 U. S. C. 74 in its present form, and provides:

> Balances certified by the General Accounting Office, upon the settlement of public accounts, shall be final and conclusive upon the Executive Branch of the Government, except that any person whose accounts may have been settled, the head of the Executive Department, or of the board, commission, or establishment not under the jurisdiction of an Executive Department, to which the account pertains, or the Comptroller General of the United States, may, within a year, obtain a revision of the said account by the Comptroller General of the United States, whose decision upon such revision shall be final and conclusive upon the Executive Branch of the Government. Nothing in this chapter shall prevent the General Accounting Office from suspending items in an account in order to obtain further evidence or explanations necessary to their settlement.
>
> The General Accounting Office shall preserve, with their vouchers and certificates, all accounts which have been finally adjusted.

Disbursing officers, or the head of any executive department, or other establishment not under any of the executive departments, may apply for and the Comptroller General shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the General Accounting Office in passing upon the account containing said disbursement.

APPENDIX B

REGULATIONS INVOLVED

Executive Order 6657–A, issued March 27, 1934, provides in material part:

* * * * *

PURPOSE OF REGULATIONS

2. The purpose of these regulations is to provide for reimbursement to officers, enlisted men, and employees of the United States (hereinafter referred to as employees), for losses sustained from appreciation of foreign currencies in their relation to the American dollar, as authorized under the aforesaid act.

METHOD OF COMPUTATION OF PAYMENT OF LOSSES

3. (a) The loss above referred to is that calculated on the basis of conversion into foreign currency of the employee's net salary and net allowances, except as provided in paragraphs (b) and (c) of this section.

(b) In case of employees serving under the War and Navy Departments (with the exception of military and naval attachés and other employees attached to their offices, who shall be governed by paragraph (a) of this section), the loss is that calculated on the basis of conversion into foreign currency of the employee's net pay and allowances.

(c) In case of employees traveling in foreign countries under official orders, not employed in or on assignment or detail to

a post of duty in a foreign country, no part of the employee's salary shall be included in the loss referred to for the purposes of these regulations.

(d) In case of employees who sustained losses arising from the conversion of salaries or allowances (including those paid from fees either in foreign or American currency) during the period from July 15, 1933, to the effective date of this order, the losses shall be calculated as provided in paragraphs (a), (b), and (c) of this section. Claim for reimbursement for such loss shall be accompanied by the best evidence, available to the employee, of the rate at which conversion was made.

* * * * *

BASIC EXCHANGE RATES FOR COMPUTATION OF LOSSES

4. For the basis of computation of losses as referred to in the aforesaid act, the following rates are prescribed as the basic rates for foreign currencies:

Country	Monetary unit	Basic rate
*	* * *	*
Germany	Reichsmark	23.74
*	* * *	*

METHOD OF PAYMENT TO EMPLOYEES

5. From and after the effective date of this order, each employee shall be entitled to receive in foreign currency such amount as he would have received by converting into such foreign currency, at the basic rates specified in section 4, his net salary and net allowances, or his net pay and allowances, as provided in section 3.

* * * * *

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 526

THE UNITED STATES OF AMERICA, Petitioner,

vs.

CHARLES KRUSZEWSKI.

Response to Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 526

THE UNITED STATES OF AMERICA, Petitioner,

vs.

CHARLES KRUSZEWSKI.

Response to Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Respondent respectfully submits to the Supreme Court of the United States and the Honorable Justices thereof, his opposing brief in the above-entitled case.

I. Opinion.

The District Court did not write an opinion. The opinion of the Circuit Court of Appeals for the Seventh Circuit (Evans and Major, Circuit Judges, and Lindley, District Judge; Circuit Judge Major, writing) was filed on October 13, 1947 and appears at pages 142 to 147 of the record. It is reported in 163 Fed. 2d, 884.

II. Jurisdiction.

The judgment was entered on October 13, 1947. Jurisdiction is invoked in petition under the provisions of

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (347 U.S.C.A. Title 28).

III. Questions Presented.

1. Whether the deficiency appropriation act was such an adjudication by Congress of respondent's claim as will bar a reopening and revision of the settlement of that claim by the Comptroller General.

2. Whether the limitation of one year, contained in Section 8 of the Dockery Act of 1894, on the time within which the Comptroller of the Treasury could revise the settlement of a public account is properly applicable to the Comptroller General, as it has been made applicable in the codification of that section and Section 304 of the Budget and Accounting Act of 1921, 31 U.S.C. 74, so as to bar a revision of the settlement of respondent's claim.

IV. Statutes, Rules and Regulations Involved.

1. The pertinent provisions of the Act of March 26, 1934, c. 87, 48 Stat. 466, as amended, 5 U.S.C. 118 c; Appendix A, petition, p. 25.

2. Section 2 of the Act of July 7, 1884, c. 334, par. 1, 23 Stat. 254, 5 U.S.C. 266—Not Listed on p. 3 in petition; printed below.

3. 31 U.S.C. 714, which repeats as cross-reference in the last sentence the text of 5 U.S.C. 266, and quotes as authority the following statutes:

> Act of June 14, 1878, c. 191, par. 4, 20 Stat. 130; July 7, 1884 c. 234, par. 1, 23 Stat. 234; June 10, 1921, c. 13, par. 304, 42 Stat. 24.
>
> Not listed on p. 3 in petition; printed below.

4. Sections 837 and 838 of Rule XXI of the Rules of the House of Representatives, 75th Congress, House Docu-

ment No. 496, p. 387, 74th Congress, 2d Session; Not Listed on p. 3 in Petition; printed below.

5. The First Deficiency Appropriation Act, fiscal year 1938, c. 42, 52 Stat. 85, 95, 99, Appendix A, petition, pp. 25-26. (Printed with deletions which deletions, however, are important to observe because they show the statutory authorities under which the audited claim of respondent was re-appropriated and certified to Congress under 5 U.S.C. 266, not printed or mentioned in petition (see *supra*, 2 and 3).

6. and 7. The Dockery Act of July 31, 1894, c. 174, sec. 8, 28 Stat. 162, 207, augmented by the Budget and Accounting Act of June 10, 1921, c. 18, sec. 304, 42 Stat. 20, 24; 31 U.S.C. 74. Appendix A, petition, pp. 26-30.

8. The pertinent provisions of the regulations relating to this case, as contained in Executive Order 6657-A, are set forth in Appendix B, petition, pp. 31-32.

V. Statement.

The disputed points are reflected in the transcript of record, especially on pp. 106-11. The court below (Record p. 143) stated that: "In view of the conclusion which we have reached, there is no occasion to relate in detail the facts out of which the instant controversy originated and which the Government alleges resulted in an overpayment to plaintiff." * * * "It was the method or formula to be applied in determining such losses which forms the basis of this controversy. In 1937, the statute and executive order were interpreted in favor of the plaintiff and as a result his claim was allowed. In 1944, long after plaintiff's claim had been allowed and paid, the Government reviewed its prior action, disallowed the claim and sought to recover from the plaintiff. In our view, the action

of the Government in 1944 in revising and determining that the claim had previously been erroneously allowed was unauthorized. It therefore becomes unnecessary to enter any discussion of the merits of the claim or whether the Government in the first instance erroneously interpreted plaintiff's rights under the statute and regulation."

VI. The writ should be denied.

A The statutory provisions and Rules of the House of Representatives eliminated by petitioner (5 U.S.C. 266—cross reference 31 U.S.C. 714 and Secs. 837 and 838 of House Rule XXI) clearly defeat petitioner's alleged issue contesting the finality of adjudication of "claims audited under the authority of the law."

Respondent does not wish to burden this Honorable Court with lengthy and extraneous arguments, but the voluminous petition compels respondent to go beyond the scope of desired brevity by this Court and "when the real situation is not set forth by the petition, a duty rests on opposing counsel to reveal it in their reply." 242 U. S. 430 *Furness, Withy & Co.* v. *Yang-Tsze Insurance Association, Limited et Al.*

In regard to the *first* question presented in their lengthy irrelevant arguments (pp. 9-16) petitioner omits the most important statutory provision, which in unambiguous language prescribes the procedure as to making reports to the Congress covering claims on balances of appropriations. Such unprinted section is quoted below in order to rebut the rather technical argument advanced by petitioner that Congress did not repeat specifically respondent's name in the First Deficiency Appropriation Act 52 Stat. 85, at 95, and therefore did not specifically

"authorize and require" the Secretary of the Treasury to pay a stated sum to an individual named in the act:

Section 714 of Title 31 U.S.C.A., in its effective form, reads:

"BALANCES OF APPROPRIATIONS; REPORTS TO CONGRESS AS TO CLAIMS

> It shall be the duty of the General Accounting Office to continue to receive, examine, and consider the justice and validity of all claims under appropriations the balances of which have been exhausted or carried to the surplus fund under the provisions of section 713 of this title that may be brought before them within a period of five years. The Secretary of the Treasury shall, at the commencement of each session of Congress, report the amount due each claimant whose claim has been allowed in whole or in part to the Speaker of the House of Representatives and the presiding officer of the Senate, who shall lay the same before their respective Houses for consideration; provided * * * (June 14, 1878, c. 191, par. 4, 20 Stat. 130; July 7, 1884, c. 334, par. 1, 23 Stat. 254; June 10, 1921, c. 18, par. 304, 42 Stat. 24.)"
>
> *Annotations*: Secretary of Treasury, at commencement of each session of Congress, to report amount due claimants whose claims have been allowed to Congress for consideration, see section 266 of Title 5. Executive Departments. Government Officers and Employees.

The last sentence of section 714 U.S.C. 31 is a textual repetition and a cross-reference of 5 U.S.C. 266. The court below used correctly the latter as principal authority in its valued opinion (163 F. 2d 884), coupled with 5 U.S.C. 118 c., granting authority for the payment of losses of exchange due to the appreciation of the Ameri-

can dollar in relation to foreign currencies, including the German mark. This Court's special attention is invited to pages 8 to 10 of the Record (Exhibit "D") from which it will be noted that 4 (four) times reference is made to authority granted under U.S.C. Title 5 Sec. 266.

Respondent's brief to the court below made specific reference to these two sections of statutes (5 U.S.C. 266 and 714 U.S.C. 31) as to the auditing of the claim, and to 5 U.S.C. 118 c. as to the authority for appropriating such money. It is evident from the records examined by the court below that the Secretary of Treasury was required by these two statutory provisions to report to Congress the amount due *each* claimant whose claim has been allowed in whole or in part by the General Accounting Office.

The entire procedure, step by step, of "auditing this claim under authorization of law" is published in House Document No. 498, 75th Congress, 3d Session (Record pages 8 to 10) and it is obvious from the learned opinion of the court below at page 885 in 163 F. 2d that it made a thorough analysis of such Document which is and remains part and parcel of the appropriation act! The court below determined that the schedule transmitted to Congress for appropriation specifically included the name of respondent. Congress consequently and subsequently appropriated for the payment of the claims as *fully set forth* in House Document Numbered 498.

Although a number of claims are added up under each department and category of application or use, in order to arrive at totals of moneys required to be appropriated, the claims *as such* were payable as certified, unless revised while pending, against each certificate of settlement, of which respondent was one of the persons whose claim

had been audited and allowed under the law and regulations in force at the time of auditing and for which he received a preliminary certificate of settlement (Rec. p. 7/8)and a Final Certificate of Settlement (Rec. 113/14).

(Incidentally, judgments reported in the same First Deficiency Appropriation Act in 52 Stat. 85, Sec. 2a for payment of the final judgments and decrees, including cost of suits, rendered under U.S.C. 28, sec. 41, par. 20; sec. 258, secs. 761-765, certified to the Congress in Senate Document Numbered 144, and House Document Numbered 490, are also lump-summed under the various departments and establishments, but such grouping certainly did not bar the individuals mentioned in the judgments to be entitled to payment of their judgments. Even the Comptroller General cannot go beyond such judgments, although under common-law principles in cases where claimants are indebted to the Government, he may set-off prior to payment of such judgments with consent of the plaintiff as provided under par. 227 U.S.C. 31, or bring suit.)

It is therefore submitted that once an audit under law is performed by the General Accounting Office, in the absence of a timely revision made in compliance with the provisions of Section 74 U.S.C. Title 31 while settlement is pending, (*U. S.* v. *Olmstead,* 118 F. 433, 55 CCA 249), under the *Rules of the House of Representatives,* it is considered an award and judgment, and for seventy years it has been held that auditing under authority of law to be "authorization" for the appropriations for the payment of claims.

This fact can be learned best from pars. 837 and 838 under rule XXI as published in: *Constitution, Jefferson's Manual and Rules of the House of Representatives of the*

United States, Seventy-Fifth Congress, House Document No. 496, p. 387, 74th Congress, 2d Session:

Par. 837. The reappropriation of an unexpended balance for an object authorized by law may be made on an appropriation bill (IV, 3591, 3592).

Par. 838. Judgments of courts certified to Congress in accordance with law or authorized by treaty (IV, 3634, 3635, 3644) and auditing under authority of law have been held to be authorization for appropriations for the payment of claims (IV, 3634, 3635). But unadjudicated claims (IV, 3628), even though ascertained and transmitted by an executive officer (IV, 3625-40), and findings filed under the Bowman Act do not constitute authorization. (IV, 3463).

According to the preface of the above-cited manual, "the rulings of the Speakers of the House and of the Chairmen of the Committee of the Whole are to the rules of the House what the decisions of the courts are to the statutes." The above-mentioned precedents and rulings thereon are published in *Hinds' Precedents of the House of Representatives,* vol. IV, and it should be noted that Congress classifies "claims audited under authority of law," together with "judgments of courts certified to Congress in accordance with law or authorized by treaty." Such adjudicated claims carry with it an inherent authorization and do not require a "specific" authorization as urged by petitioner, nor is an examination as to fact or law necessarily the function or duty of Congress, which can be learned from precedent IV, 3638 which makes a complete analysis of these aspects, quotes the jurisdictional text of 5 U.S.C. 266, also Sec. 8 of the Dockery Act as the pertinent statute governing the auditing and the one year limitation of revision of claims and the holding

by the Committee of the Whole that "the finding and judgment of the Comptroller constitute the only legal authority for the payment of the claim." The full text of such precedent was before the court below. (Exhibit CC, item 3 p. 35, Record and verified by exhibits DD and EE telegraphically by the competent Parliamentarian of the House of Representatives, simultaneously indicating that the Congress still considers sec. 8 of the Dockery Act of July 31, 1894 existing law (see below under "B").

It will be observed that the first citation in the credit to the text of 31 U.S.C. 714 (*supra*) is June 14, 1878, c. 191, par. 4, 20 Stat. 130, making it the duty of the several accounting officers of the Treasury (in 1921 substituted by the General Accounting Office) "to continue to *receive, examine, and consider the justice and validity* of all claims under appropriations the balances of which have been exhausted * * *" (Italics supplied). The same type of authority and function will be found involved in the *Price* case (116 U.S. 43), which case the court below used partly in support of its studied opinion. The payment to *Price* was made as a result of an appropriation act of March 3, 1875, 18 Stat. 637, 646, chap. 205, on the basis of a claim reported allowed by the Commissioners of claims under the Act of Congress of March third, eighteen hundred and seventy-one. (1871, c. 116, s. 2, vol. 16 Revised Statutes, p. 824).

A careful review of the latter act will reveal that according to section 2 the President of the United States was authorized to nominate * * * and appoint a board of commissioners as commissioner of claims * * *"whose duty it shall be to *receive, examine, and consider the justice and validity of such claims* as shall be brought before them. * * *" (Italics supplied). And section 4

of the same act contains practically the same provision as the present section of 5 U.S.C. 266 and incorporated in 31 U.S.C. 714:

> "Sec. 4. That said commissioners shall make report of their proceedings, and of each claim considered by them, at the commencement of each session of Congress, to the Speaker of the House of Representatives, who shall lay the same before Congress for consideration; * * *"

In the equally supporting case, *U. S.* v. *City of Louisville* (169 U.S. 249), the Board of Commissions of the Sinking Fund of the City of Louisville, Kentucky, submitted their claim and the First Comptroller audited it, sent his report to the Acting Secretary of Treasury, who transmitted it to The Speaker of the House of Representatives and on February 14, 1891, it was referred to the Committee on Appropriations, being ordered printed by the House of Representatives as Executive Document No. 260, 51st Congress, 2d Session (vol. 36). Under the act of March 3, 1891, c. 540, being an appropriation to supply deficiencies, 26 Stat. 862, at 867, Congress provided "*for payment* (italics supplied) to the city of Louisville, Kentucky, the amount found due, under the act of Congress approved June 16, 1890, and reported to Congress in House Executive Document No. 260, $42,514.03."

Congress and this Court held it to be an audited claim, and payment being made, it was considered final and conclusive on all parties, including any court. The same situation prevailed in the *Price* case analyzed above, and the court below by using the two cited cases in support of respondent's case below, correctly and fully upheld the entire procedure required by Congress and laid down in Section 714 U.S.C. Title 31 and Section 266 U.S.C. Title 5. It recognized clearly and described succinctly the

legal principle that without such an audit and adjudication, no appropriation could be made, and that any untimely or unauthorized revisions of such settlements, would be contrary to the well-established law of the land. This court saying in the *Price* case: "It was when the payment was made and is now, the law of the land that he was entitled to that sum from the United States on account of his claim."

Petitioner relies heavily on the case of *Buchanan* v. *Patterson,* 190 U. S. 355. The original findings in this case were made by the Court of Claims under the so-called *Bowman Act* to persons not specifically named, and such findings did not and do not constitute "authorization" for payment under the long and well-established rule of the House of Representatives (*supra,* and IV, 3643). Nothing in this latter case can be found that can be regarded as relevant or controlling, whereas the *Price-Louisville* cases are definitely applicable and are cited at intervals throughout our legal history in cases in which it is held that the Congressional intention to intrust the determination of the questions therein involved to the discretion of persons or agencies, acting in quasi-judicial, rather than in a ministerial capacity, unless impeached for fraud or mistake of calculation, must be accepted as final and conclusive, and are not subject to review, unless specifically provided for by law, as in 74 U.S.C. 31.

The matter of fraud being specifically denied in this case as a result of a determination by the Attorney General of the United States (record p. 13, item 27), and no claim as to mistake in calculation being made or established, the court below saying on page 144 of Record, that if any mistake was made as alleged by petitioner, it

was a mistake in interpretation of the statutory provision and the executive order issued pursuant thereto as to the method properly employable in determining the amount of plaintiff's loss, it is submitted that the court below did not draw from the *Price-Louisville* cases in its decision any broader rule than that an allowance in this class of cases, including the one at bar, is not an "ordinary" or routine" claim as petitioner is now attempting to purport, but a "statement of accounts by one having authority for that purpose under an act of Congress." It may therefore be safe to conclude that the court below did not unreasonably or at liberty enlarge by construction the plain and unambiguous provisions of the statute through any misapplication of the decisions of this Court.

The federal courts, the General Accounting Office, and some other federal agencies, such as the Veterans Administration, within the scope of their designated statutory jurisdiction are authorized by law to investigate claims against the Government of the United States and determine legal liabilities incurred, but they do not deal with questions of appropriations. The authority of the Congress to make appropriations, within the framework of the Constitution (Art. I, Sec. 9, Clause 7), is plenary and having made such an appropriation on a direct settlement "duly received, examined, and found valid and just" by the General Accounting Office in a certificate of settlement issued specifically to claimant (respondent), and paid without being revised, doubtless constituted a final adjudication and therefore appears to be conclusive on all parties concerned, including any court. (*United States* v. *Price,* 116 U.S. 43, 6 S. Ct. 235, 236, 29 L. Ed. 541; *United States* v. *Louisville,* 169 U.S. 249, 18 S. Ct. 358, 42 L. Ed. 735).

It is considered incumbent upon respondent to correct a drastic error made by petitioner on page 14 (lines 14 to 17) in stating that "claims for amounts chargeable against such funds (unexpended appropriation balances under 31 U.S.C. 713) may be filed at any time up to ten years. (31 U.S.C. 71 (a), 237.

Section 714 U.S.C. 31 (printed in full above) provides specifically that "all claims under appropriations the balances of which have been exhausted or carried to the surplus fund under the provisions of section 713 of this title may be brought before them (the General Accounting Office) within a period of *five* years." (Italics supplied).

The *ten* year limitation applies only to claims or demands (with stated exceptions) against the United States cognizable by the General Accounting Office under sections 71 and 236 of this title (31 Money and Finance) as provided under sections 71 (a) and 237 U.S.C. 31. Section 71 refers to "public accounts to be settled in the General Accounting Office" and section 236 to "meritorious claims against United States not subject to lawful adjustments; submission to Congress by Comptroller General."

The court below clearly recognized this confused and wrong conception of petitioner by bringing an *audited claim* cognizable *only* under Section 714 Title 31 (266 U.S.C. Title 5) under Section 71 U.S.C. Title 31. As to the cases cited by petitioner and repeated in footnote 2 on page 10 of petition, including an inapplicable comment and an attempt to assimilate them with the *Jordan, Price,* and *Louisville* cases decided by this Court, the court distinctly said at p. 886 (163 Fed. 2d): "We think it is unnecessary to cite or discuss these cases for the reason that the rule is without application to the facts of the instant situation."

Furthermore, the court said at p. 886 (163 Fed. 2d) (2):

"The Government, in support of its position, relies strongly upon Title 31 U.S.C.A. section 71, which provides: (Text follows).

"We think this provision is of no benefit to the Government under the circumstances of the instant case. Especially is this so when taken in connection with Title 31 U.S.C.A. section 74, which provides in part: (Text).

Petitioner now comes and attempts to contest the validity of 31 U.S.C.A. Section 74 under question 2 presented above.

B. Petitioner's claim as to the alleged inconsistency and invalidity of 31 U.S.C.A. 74, after checking all available sources with the Committee on the Revision of Laws, House Judiciary, and the Official Codifiers and Custodian of the Statutes, is unfounded and is still considered existing law.

On page 16 of his petition it is stated that "the court below also held that the Comptroller General's authority to revise the settlement of a claim is limited to one year by 31 U.S.C. 74." Petitioner continues to state:

> While *concededly* 31 U.S.C. 74, in its present form does contain this limitation on the power of the Comptroller General, and, if valid, barred the revision here involved, we submit that in its present form 31 U.S.C. 74 is an erroneous codification of the basic statutes." (Italics supplied.)

Petitioner prints the material portion of Section 8 of the Dockery Act on page 17 and introduces such re-print with words to the effect that "the citations in the credit to the test of 31 U.S.C. 74 are section 8 of the Dockery Act of July 31, 1894, c. 174, 28 Stat. 207, and Section 304 of the Budget and Accounting Act of June 10, 1921, c. 18, 42 Stat. 24."

The *full* text of these two sections involved are reprinted in Appendix "A" to petition, pp. 26-28 (items 3 and 4). Under item 5 petitioner prints the text of 31 U.S.C. 74 as originally codified in the 1926 edition of the United States (which edition temporarily eliminated the provision concerning the conclusiveness of balances certified and the revisions to be obtained by the three parties named).

Careful research work of the official codifiers, in preparing the United States Code Annotated, discovered no specific authority for the change from the wording of the Statutes-at-Large, and, therefore, appended a caveat in the third paragraph of the "Historical Note," reading:

> "Prior to its incorporation into the Code, this section contained further provisions concerning the conclusiveness of balances certified, revision by the Comptroller of the Treasury, etc. but that "they were probably omitted as superseded by Act June 10, 1921, c. 18, particularly sections 301, 304, and 310."

Prior to the hearing before the court below, these official compilers advised respondent that very probably because of this editorial note in the United States Code Annotated, Congress later decided as a result of several complaints and letters from the Bench and Bar that the omission that it originally made when compiling the United States Code was not justified and in Supplement V (1931), of which they supplied a photostat, and in subsequent cumulative supplements VI and VII to the United States Code, it published the text of the present form of 31 U.S.C. 74 with an explicit statement underneath:

"THIS SECTION HAS BEEN RESTATED TO EXPRESS EXISTING LAW."

Upon printing the new Code of the Laws of the United States in force January 3, 1935 (1934) edition and the 1940

edition, in force on January 3, 1941, this re-stated section was carried on in both editions and still reads as shown under item 6 on pages 29-30 in Annex "A" of the petition, and these editions were in force when the Comptroller assumed authority to act contrary to the one-year limitation expressed in U.S.C. 74.

According to the preface to the First Edition of the Code (1926) "the presumption (of inconsistencies) is rebuttable by production of prior unrepealed Acts of Congress at variance with the Code. Because of such possibility of error in the Code and of appeal to the Revised Statutes and Statutes at Large, a table of statutes repealed is published therein." Petitioner does not offer any such rebuttal of repeal; the custodian of the statutes, the State Department of the United States, under whose supervision the statutes are printed, could not find any express repeal, and a most thorough search by the Committee of the Revision of Laws, House Judiciary, under whose supervision the Codes and Supplements are published, based on the authority provided by Joint Resolution of March 3, 1929 (H. J. Resolution 399—Pub. Res. No. 101) c. 586, 45 Stat. 1540, at 1541 section 2a is convincing that the statement in the Vth Supplement (1931) expressing that Section 74 U.S.C. 31 "HAS BEEN RESTATED TO EXPRESS EXISTING LAW" was and is still correct and that petitioner's allegation of inconsistency and invalidity could find no support.

The parallel Reference Table II in the Codes show as unrepealed Statutes at Large: Act of July 31, 1894, c. 174, s. 8, vol. 28, p. 207 . . . . 31 U.S.C. 74.

Section 304 of the Budget and Accounting Act of June 10, 1921, c. 18, 42 Stat. 24 was correctly published in all editions of the U. S. Code in Section 44 of Title 31. It

transferred certain powers and duties to the General Accounting Office and to the Comptroller General, wherefore the term "the Comptroller of the Treasury" was textually substituted by "the Comptroller General" in 74 U.S.C. 31. The fact that the 1926 edition of the U. S. Code incompletely stated section 74 Title 31 is immaterial. It was corrected by the Vth supplement (1931) and the pertinent section was restated by Congress to express "existing law."

The Comptroller General, when he assumed his duties in 1921, considered it "existing law" in his own circular 1921 No. 2, dated August 23, 1921, published in *1 Comp. Gen. 775*, at *776* under the title: *Revision, Reopening, or Review of Audited Settlements;* this circular letter clearly indicates under subsection (4) that the Comptroller General is listed among the officers and persons by whom the revision of settlements may be obtained within one year from the date of the settlement by the Comptroller General. It remained unchanged in effect because it is cited and repeated in the *Code of Federal Regulations of the United States* (1939), Title 4, Accounts, Chapter 1, General Accounting Office, Part 2, Revision, Reopening, Review of Settlements, Section 2.1.

Petitioner's claim of invalidity of section 74 U.S.C. Title 31 is obviously unfounded and the Court below certainly did not err in holding that the revision by the Comptroller General of respondent's settled and paid account was without authority because it was made more than one year after settlement, thus leading unavoidably to the conclusion that petitioner was guilty of laches, wherefore it is respectfully submitted that the court's opinion of October 13, 1947 (163 Fed. 2d, 884) should stand as written, thereby "attributing to the circuit court of appeals a prestige which invites reliance for the burdens of appellate review."

• • • • •

C. The decision below conforms to the applicable statutory provisions and House rules as well as to decisions of this Court; is not in conflict with decisions rendered by other Circuit Courts, and does not involve principles of far-reaching effect, overthrow administrative fiscal construction or diminish the power of the Comptroller General.

As shown above under chapter VI (A), the decision below conforms to the applicable statutory provisions and House rules as well as to decisions of this Court. It is evident that the court's first holding did not result from a complete misapprehension of the applicable decisions of this Court. It correctly and admirably upheld the Vth Amendment of our Constitution and also observed constitutional law to the extent that "the judiciary cannot go behind an act of Congress, to show motives of Legislature, or from whence it derives its knowledge." (*Baker* v. *U. S.* 27 F. 2d 863, at 876, citing *U. S.* v. *Price,* 116 U. S. 43.) The decision below is therefore not in conflict with the foregoing decision rendered by another Circuit Court and conforms to the decision rendered in *U. S.* v. *Olmstead,* 118 F. 433, 55 CCA 249.

While the decision below in its clarifying form of studied accuracy may affect adversely some unwarranted procedures in the administration of the fiscal affairs of our government, it is the view of respondent that the two questions of federal law presented by petitioner by means of important omissions disclosed above, aided by considerable irrelevant make-weight and confusion, are not of such importance and substance or involve principles of far-reaching effect, overthrow administrative fiscal construction or diminish the power of the Comptroller General of the United States. (*United States* v. *Riner,* 230 U. S. 547).

For instance, on page 16 of the petition an attempt is made to impress this Court that Congress has modified the

procedure in recent years, beginning with the First Deficiency Appropriation Act, 1945, c. 95, 59 Stat. 77, 90. Such *exceptional* legislation (enacted eight years after respondent's claim was finally and conclusively settled and paid) is irrelevant and is a one-time legislation limited to certified claims up to $500.00 covering two fiscal years only (1945 and 1946) arising in the Bureau of Accounts of the Treasury Department. It did NOT repeal, change, effect or create inequitable results within the meaning of the long established statute or intentions thereunder, enacted as 714 U.S.C.A. Title 31 (5 U.S.C.A. 266). A few pages onward in c. 95, 59 Stat. at 94 appropriations will be found duly made under Sec. 304 for the payment of claims certified to be due by the General Accounting Office * * * under 5 U.S.C. 266, including claims on foreign currency; in c. 589, same statute 59 Stat. 632, at 657, Sec. 204 similar "audited claims" are granted appropriations.

The several cases of overtime pay listed in footnote 7 page 22 of petition were NOT "balances certified by the General Accounting Office to Congress" BUT judgments made in the Court of Claims and reviewed on certiorari to that court by this Court. Section 74 U.S.C. Title 31 obviously has no bearing whatsoever on such judgments and decrees of the Court of Claims for which a review is provided under section 288 U.S.C. Title 28.

Furthermore, considerable irrelevant make-weight is included in Record pp. 38-102. Not one of these decisions by the Comptroller General refers to claims audited under authority of law. (5 U.S.C. 266—31 U.S.C. 714).

Error is also assigned to footnote 6 of page 22 of petition. While it is admitted under the cases cited that the right of set-off is inherent in the United States Government and is grounded in the common-law right of every

creditor to apply the moneys of his debtor in his hands to the extinguishment of claims due him from the debtor, it is settled that such right of set-off is not enforceable so far as concerns the withholding of current compensations to officers and employees still in the Federal Service. See *Smith* v. *Jackson* 246 U. S. 388 and record p. 5 item 22; action of withholding can be brought only within the narrow category and defined particularity of the Act of May 26, 1936 (c. 452, 49 Stat. 1374)—5 U.S.C. 46 (b). See record p. 4 item 20. (The court below, deciding the primary issue in favor of respondent, did not find it necessary to decide whether the Government had a right to set off the alleged overpayment against monies advanced and otherwise due respondent.)

CONCLUSION.

For the reasons stated above (VI A to C), it is respectfully submitted that the petition for a writ of certiorari be denied.

Respectfully submitted,
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